

memorandum

date: August 12, 1999

VIA FAX

from: District Counsel, Illinois CC:MSR:ILD

subject: [REDACTED] Consents

Taxpayer: [REDACTED]
EIN: [REDACTED]
Years: [REDACTED] and [REDACTED] through [REDACTED] (prior cycle)

You asked us several questions concerning how you should obtain consents to extend the statute of limitations for this taxpayer for the years [REDACTED] through [REDACTED]. You have obtained consents for all of the years at issue, as follows:

TYE ¹	Date signed by Taxpayer	Date signed by Commissioner	Extended To
[REDACTED]	(missing from our copy)	(missing from our copy)	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	(none obtained)		

* These tax years are as reflected on the consent, but do not conform to prior consents.

FACTS

_____ filed consolidated returns for _____ through _____ owned a single subsidiary, _____ which in turn owned other subsidiaries. On _____ purchased _____ and the subsidiaries from _____. _____ is then parent, _____. The agreement provided that _____ would have legal responsibility for the tax liabilities for _____ and earlier.

Except for _____, all of these corporations are or were Delaware corporations. In addition, during the audit years _____ owned several other subsidiary corporations. As we understand the facts, these subsidiaries were owned indirectly through _____ and included _____

_____ gave the Commissioner a Power of Attorney, Form 2848, in _____ under which _____ individuals associated with _____ an accounting firm, were designated as representatives of _____ for _____ though _____

On _____ the board of directors of _____ approved a resolution to merge _____ into _____ with _____ being the surviving corporation. On _____ a certificate of ownership and merger was filed, with the merger effective on the date of filing of the certificate. The certificate provided that _____ assumed all of the obligations of _____. Subsequently, the board of directors of _____ approved a resolution to merge _____ into _____ with _____ being the surviving corporation. On _____ a certificate of ownership and merger was filed, with the merger effective on _____. The certificate provided that _____ assumed all of the obligations of _____

As can be seen from the above chart, at various times the taxpayer has extended the statute of limitations on assessment for each of the years _____ through _____. The most recent of those extensions was in _____ ("_____ consent."), extending the statute of limitations to _____

During _____ _____ was an officer (vice-president and assistant secretary) of _____ and as far as we know, remains so. _____ was also an officer (vice-president) of _____ and of _____. On _____, _____ signed the _____ consent, and the consent reflects his signing capacity as "Vice-President."

DISCUSSION

A. Extension of the ordinary statute of limitations

Treas. Reg. § 1.1502-77(a) provides that the common parent "shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax

liability for the consolidated return year." The common parent remains the agent for the members of the group for any years in which it was the common parent. Thus, as a general rule, the common parent remains the proper party to extend the limitations period and receive notices of deficiency for any taxable year during which it was the common parent, as long as it remains in existence understate law.

In this case, [REDACTED] ceased to exist prior to the time that the [REDACTED] consent was signed.. However, when the common parent goes out of existence as a result of a transaction under § 381, the parent's successor(s) can execute a waiver. Treas. Reg. § 1.1502-77T(a)(4)(ii) Section 381 applies to statutory mergers under § 368(a)(1)(A). [REDACTED]'s merger into [REDACTED] and [REDACTED]'s merger into [REDACTED], were both statutory mergers. Inasmuch as [REDACTED] as an officer of [REDACTED] had the authority to sign the [REDACTED] consent on behalf of [REDACTED] the [REDACTED] consent validly extends the [REDACTED] statute of limitations to [REDACTED]²

Therefore, the statute of limitations is open for a further extension of the statute. However, we recommend that you identify the taxpayer as follows on the consent:

"[REDACTED] (EIN: [REDACTED]), as successor by merger to [REDACTED] (EIN: [REDACTED]) and as successor by merger to [REDACTED] (EIN: [REDACTED]) and as agent of the [REDACTED] affiliated group"

The EIN to put in the upper right corner of the Form 872 should be that of [REDACTED]

The consent should be signed by a current authorized officer of [REDACTED]. It should not be signed by anyone with a power of attorney from [REDACTED] or [REDACTED]³. The proof of the signing officer's authority can be in the form of a corporate minute reflecting by name or by position who is authorized to sign consents for [REDACTED] covering the [REDACTED] through [REDACTED] returns.

² An argument might be made by a taxpayer that the alternative agency rules of Temp Reg. 1.1502-77T only provides as an alternative agent: a successor of the common parent, not a successor of a successor of the common parent. We would argue otherwise. However, even if this consent were not effective as to an agency status for [REDACTED] with regard to the [REDACTED] group, the consent will in any event be effective as to [REDACTED]'s status as a successor of [REDACTED] and in that capacity [REDACTED] is liable for the entire consolidated tax of the group. Under Treas. Reg. 1.1502-6, [REDACTED] was severally liable for the entire consolidated tax of the group and therefore its successor will likewise be liable for that amount. Note that the Certificates of Ownership and Merger specify that [REDACTED] assumed the liabilities of [REDACTED] and [REDACTED] assumed the liabilities of [REDACTED]

³ You asked whether [REDACTED] has authority to sign a consent on behalf of [REDACTED] and the answer is no. In fact, we recommend that you not have any dealings at all with [REDACTED] unless [REDACTED] authorizes it.

The name of the corporation on the back of the consent where it says CORPORATE NAME should be [REDACTED]

B. Problem with the description of the tax years.

Our examination of the chain of consents disclosed that the earlier consents referred to taxable years [REDACTED] through [REDACTED] ending December 29, 28 and 26, respectively. The [REDACTED] consent, on the other hand, refers to taxable years ended December 31 for each of those years. The correct taxable years should be determined by examination of the returns, and reflected on any new consents that you obtain.

The discrepancies concerning the taxable years can be used to create a little bit of a nuisance if the taxpayer is inclined to raise the matter, but the problem is not serious and will not invalidate the consents. *Buchine v. Commissioner*, 20 F.3d 173 (5th Cir. 1994), *affg.* T.C. Memo. 1992-36.

C. Extension of the Transferee statute of limitations

As a matter of caution, and in order to sidestep any arguments the taxpayer might raise concerning the [REDACTED] consent, we recommend that in addition to the form 872, you obtain a signed transferee consent, form 977, and also form 2045, from [REDACTED]. You should get one set (i.e., forms 977 and 2045) from [REDACTED] as transferee of [REDACTED] and another such set from [REDACTED] as transferee of [REDACTED].

If [REDACTED] does not agree to sign these forms 977 and 2045, you should

(1) treat [REDACTED] as the expiration date for the statute of limitations on transferee liability for [REDACTED] through [REDACTED] and

(2) ascertain the filing date for the [REDACTED] return (ordinarily [REDACTED]), the expiration of the current statute of limitations for that return (ordinarily, [REDACTED]) and compute the transferee statute as expiring one year later (ordinarily, [REDACTED])⁵

Finally, you asked about the government's position concerning the use of for 872A, which allows the taxpayer to terminate the consent. You indicated that the taxpayer has requested that such a consent be used in this case. Form 872A can be used to extend the statute in this case, if you wish to use it.

⁴ This date is based on the assumption that the [REDACTED] consent is defective, either because it was improperly signed or because it improperly identified the taxable years involved.

⁵ Inasmuch as you have not provided us with a consent for [REDACTED] we suspect that the statute does not expire until a later date, due to late filing. Assuming that the [REDACTED] return was filed [REDACTED] [REDACTED] the transferee statute will expire [REDACTED]

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